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No. 365.

Brf. of Atty. Gen. for Appellee.

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Supreme Court of the United States.

OCTOBER TERM, A. D. 1901.

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BENJAMIN D. GREENE, JOHN F. GAYNOR, WILLIAM T. GAYNOR and EDWARD H. GAYNOR, *Appellants,*
vs.
WILLIAM HENKEL, United States Marshal in and for the Southern District of New York, *Appellee.*
} *Habeas Corpus.*

BRIEF FOR APPELLEE.

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IN THE

Supreme Court of the United States.

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STATEMENT OF CASE.

1. On December 8, 1899, at the November term, 1899, of the District Court of the United States for the Eastern Division of the Southern District of Georgia, a true bill of indictment was found by the grand jury, charging in several counts the defendants, Benjamin D. Greene, John F. Gaynor, William T. Gaynor and Edward H. Gaynor, and others, with conspiring with Oberlin M. Carter, late captain in the Corps of Engineers, United States Army, and engineer officer in charge of the Savannah engineering district, to defraud the United States, and to present false accounts, in violation of Sections 5,440 and 5,438 of the Revised Statutes.

2. On December 14, 1899 (Rec., 39), the defendants, Benjamin D. Greene, John F. Gaynor, William T. Gaynor and Edward H. Gaynor, were arrested in the South-

ern District of New York on a warrrant issued by John A. Shields, United States Commissioner, based upon sworn complaint (Rec., 7; Amended, Rec., 42), charging them with having committed, in the Eastern Division of the Southern District of Georgia, the offenses described in the indictment, to which complaint a copy of the indictment (Rec., 14) was attached, duly certified. (Rec., 13.)

3. In due course the defendants were brought before the commissioner for hearing on the question of bail or commitment, and were enlarged on bail to await examination (Rec., 39). At the hearing before the commissioner (which will be hereinafter referred to as the "first hearing," to distinguish it from a second hearing had under rulings of his Honor, United States District Judge Brown), the government offered in evidence (Rec., 2 and 3 and 45 and 46), a duly certified copy of the indictment, together with the testimony of witnesses, fully identifying the defendants as being the persons so indicted and proving that they had been in the Eastern Division of the Southern District of Georgia at the period in which they were charged with having committed the offense charged in the indictment. The defendants offered no testimony to show that they were not the persons indicted (Rec., 45 and 46), or to show that they had not been in the Eastern Division of the Southern District of Georgia during the period in which they were charged with having committed the crimes charged in the indictment, but did consume several months in offering testimony tending to disprove their guilt of the charge set out in the indictment, all of which, consisting of nearly 1,100 pages of typewriting, besides documents (Rec., 45), being directed solely to the question of guilt or innocence on

the merits of the case, was excluded by the commissioner as incompetent. (Rec., 3 and 46.)

4. On February 20, 1900, the defendants having ceased to offer testimony at this (the first hearing), the commissioner duly made and entered his order on the complaint, finding probable cause to believe the defendants guilty, and committing them to the custody of the marshal to await a warrant for their removal from the Southern District of New York to the Southern District of Georgia for trial. (Rec., 41.)

Thereupon a motion for a warrant to remove them was promptly made before the United States District Judge, Honorable Addison Brown, the record of the proceedings before the commissioner being produced and full argument had. (Rec., 45.)

5. On April 4, 1900, after having taken time to consider, Judge Brown delivered his opinion (Rec., 45), holding that a duly certified copy of a valid indictment (Judge Brown's first opinion, Rec., 49, and second opinion, Rec., 59), supported by evidence identifying the defendants as the persons charged in the indictment and establishing the fact that they were in the district where the indictment was found at the time the offense was charged to have been committed, was not sufficient to authorize the issue of a warrant of removal over the objection of the defendants; that a certified copy of the indictment was to be treated by the commissioner merely as an *ex parte* affidavit, subject to be rebutted by evidence offered by the defense, precisely as in a case where there is no indictment. (Judge Brown's first opinion, Rec., 46 and 47.)

6. The defendants having been enlarged on bail by him (Rec., 157), on June 26, 1900, Judge Brown made an order sending the case back to the commissioner "for further competent testimony offered by either side in accordance with the opinion rendered herein." (Rec., 41 and 55.)

On July 6, 1900, in pursuance of this order, the hearing before the commissioner was commenced, the defendants appearing before the commissioner in pursuance of said order. (Rec., 55.)

At this second hearing, the government was compelled to and did introduce a large number of witnesses and much documentary evidence to establish the guilt of the defendants, but closed its case on August 13, 1900.

With adjournments obtained and time taken in making as full a defense as if the case were on trial before a jury, the defense did not close its case until November 16, 1900.

Two days were taken by the government in rebuttal, the case upon the testimony being closed November 19, 1900. The oral and documentary evidence before the commissioner was voluminous (Rec., 59). It covered some 5,000 pages of typewritten matter and several trunks full of documents. Extended briefs were printed, oral arguments made, and the case finally submitted to the commissioner, who, on February 25, 1901—a year and five days after his first finding—made a second finding of probable cause of guilt, this time upon the entire record and evidence, and he again ordered the defendants committed to the custody of the marshal to await the warrant of removal. At once a second motion for a warrant of removal was made to his Honor, Judge Brown.

7. On May 15, 1901, Judge Brown, having taken time to consider the voluminous record and evidence submitted to him (Rec., 3), delivered his opinion (Rec., 55), holding that not only had the government established probable cause to believe there was a conspiracy to defraud in the letting of the contracts for river and harbor improvements by Carter to the defendant contractors, but that:

> "It has shown beyond question, that Captain Carter, the employe of the government, and the engineer in immediate charge of the work, on the government's behalf, had, for several years immediately preceding the contract referred to in the indictment, received from the contractors continuously, through his father-in-law, in money, divisions of profits, one-third of the final net proceeds of each contract remaining for division among the chief contractors, and that this one-third amounted in the aggregate to over $700,000." (Rec., 59.)

On May 28, 1901, in accordance with this opinion, Judge Brown issued his warrant to the marshal for the removal of the defendants to Georgia for trial. (Rec., 163.)

8. But the defendants were not so removed, for immediately upon surrendering themselves to the marshal, on June 8, 1901 (Rec., 1), they applied to the Circuit Court of the United States for the Southern District of New York for a *writ of habeas corpus,* alleging that they were illegally held in custody by the marshal. They attached to their application the processes and pleadings in the proceedings before the commissioner and before the United States District Judge, and the several findings of the commissioner and the findings and the opinions of the District Judge, but only so much of the evidence

as related to the attack made on the legality of the impaneling of the grand jury, the contention of the defendants being that the indictment was void because of irregularities in impaneling the grand jury, and was, moreover, defective in form and substance, and that there could be no removal upon a complaint supported by proof of guilt, if their contention as to the sufficiency of the indictment could be sustained.

On the same day, June 8, 1901, that the petition for *habeas corpus* was presented to the United States Circuit Court (Judge Lacombe), the application was denied (Rec., 165), an appeal to the Supreme Court and supersedeas allowed (Rec., 167), and defendants enlarged on bail. (Rec., 172.)

Questions at Issue.

(A.) Was the indictment properly put before the commissioner by a certified copy?

(B.) Was there any sufficient or competent evidence before the commissioner to impeach the finding of the indictment by the Georgia grand jury?

(C.) Was the indictment sufficient in form and substance as a pleading?

(D.) Was the copy of the indictment duly certified, with evidence of identity of defendants as the persons indicted, and proof that they were in the district at the time of the alleged offense, and the finding by the commissioner of probable cause of guilt thereon sufficient in itself to have required the warrant of removal.

(E.) Irrespective of the question of the validity of the indictment, there having been a sworn complaint

made before the commissioner charging a crime against the laws of the United States with sufficient averments to put the defendants on notice, and sworn testimony taken before the commissioner at the hearing establishing, as stated in his finding, probable cause of guilt, was not this sufficient in itself to authorize the warrant of removal?

(F.) Where it appears on the face of a petition to a Circuit Court of the United States that the petitioners are held on a warrant in process of execution regularly issued by a District Judge for removal of defendants to another district within the United States, for trial in a court of the United States in that district, in which court the defendants can raise all the questions made in the petition and have same reviewed in the Supreme Court of the United States or appropriate appellate court, ought not such Circuit Court to refuse to interfere with a case so in process of adjudication, and if it declines for such reason, is it bound under existing law to interfere with the regular course of adjudication by granting supersedeas and appeal?

Many of the questions made in the court below by the defense, and presumably to be insisted upon here, might well upon authority be ignored upon *habeas corpus*. But on account of their bearing upon the future progress of this case, as well as the great public importance attached to the settlement of questions of practice which by erroneous application have very nearly subverted public justice in this case, we have thought proper to discuss them fully.

(A.)

THE INDICTMENT WAS PROPERLY INTRODUCED IN EVIDENCE.

The defendants objected to the introduction before the commissioner of a certified copy of the indictment from the District Court in Georgia:

(a.) Because the original indictment should have been produced and because there is no statute of the United States authorizing the use of a certified copy as evidence.

This objection is discussed and conclusively answered on principle and authority, showing that while a certified copy of an indictment from one court is admissible in another, that the original indictment, outside of the court where it is found, would not be even competent evidence, in

United States v. *McKee*, 4 Dill., 5.

The Supreme Court has said:

> "On general principles of law, a copy given by a public officer whose duty it is to keep the original ought to be received in evidence."
>
> *United States* v. *Percheman*, 7 Pet., 85.

A duly certified copy of an indictment is not only admissible, but has been held at least *prima facie* evidence of the facts alleged.

U. S. v. *Haskins*, 3 Sawyer, 262.
Re Alexander, 1 Lowell, 530.
U. S. v. *Shepard*, 1 Abb., 431.

(b.) Because the certificate to the copy of the indictment was signed in the name of the clerk by his deputy and not by the clerk in person.

This point is covered by decisions in the following cases:

Garneau v. *Dozier*, 100 U. S., 7.
Confiscation Cases, 20 Wall., 111.
See, also, Bacon's Abrdg., Vol. 7, p. 316 L.

(c.) Because there is no certificate of the judge attached to the certificate of the clerk that the certificate is in due form, as required by the Act of Congress providing for certifying records from state courts when intended for use in evidence in other states. (Sec. 905, R. S.)

It is obvious that the statute does not in terms apply to records from the courts of the United States when presented to other United States Courts. And it was not intended to so apply.

Embry v. *Palmer*, 107 U. S., 9.

The reason for the requirement where the record of a state court is to be used in courts of another state is that the latter courts would not know whether the certificate from each state court clerk was in due form and under the seal of a court of record or not. But this is not so as to records of a United States District Court.

Every court of the United States will take judicial notice that the United States District Court for the Southern District of Georgia is a count of record. (*Ex parte* Watkins, 3 Pet., 193.) That it has a clerk (Sec. 555, R. S.) and deputy clerks (Sec. 558, R. S.). That it uses a seal (Sec. 911, R. S.) to give verity to its proceedings, where certified under the hand of the clerk. And that it proceeds according to the cause of the common law. (*U. S.* v. *Reed et al.*, 12 How., 365; *U. S.* v. *Nye*, F. R., 890.)

Therefore the judges of the District Court of the United States for the Southern District of New York is as competent to determine whether the certificate to an indictment from the District Court of the United States for the Southern District of Georgia is in due form as would be the judge of the latter district.

This point has been expressly decided in a well considered case.

Mewster v. *Spalding,* 6 McLean, 24.

(B.)

ATTACK ON EMPANELING OF THE JURY.

The first point made is that the drawing of the names of persons from the box took place in open court at Macon, in the Western Division of the Southern District of Georgia, and not in the Eastern Division of that district, in which division the crime is charged to have been committed:

1st. Because the act creating the divisions provided that crimes committed in a division shall be cognizable in that division.

But all the provisions of this act must be construed together. There was provided only one judge for the entire district, one marshal and one clerk for the entire district, and by expressly providing that "issues of fact" shall be tried in the division in which the cases are pending, the intention is clearly shown not to limit the place of the performance of any of the duties of these officers, which theretofore might have been performed in any part of the district, to a particular division, except in the particular stated.

The Act of 1879 does not require that the jury commissioner take any part in the drawing of names from the box; nor does it require that the judge shall do it himself.

Agnew v. *United States,* 165 U. S., 36.

The fact that the drawing might have been made for, sufficient reasons, in any part of the district, is shown by

the provision in the Act of 1879, that the jury might be drawn from the jury box of any county in the district. All that the law requires in that particular is that the drawing shall be done in a public manner. And this was done. It was done in open court at Macon. (Rec., 62 and 75.) This implied, at least, the presence of the judge on the bench, the clerk or deputy, the marshal, bailiffs and other officers. The testimony is that the district attorney was also present, and others. (Rec., 75.) See:

Barrett v. *United States*, 169 U. S., 218.
Barrett v. *United States*, 169 U. S., 231.

2d. The same objection is urged because the indictment charges that it was found by a grand jury chosen, selected, impaneled and sworn "in and for" the Eastern Division of the Southern Disrict of Georgia, while the actual drawing of names from the Eastern Division jury box was done by the judge while he was physically in the Western Division of the district.

Now, the introductory formula of words used in the indictment comes down from the common law, long antedating the Act of 1879, providing for drawing juries from a jury box, and must be understood with reference to former conditions.

There was a certain kind of choosing when the sheriff summoned a panel to attend the court. There was still further choosing and selecting when, by challenges, to the array, or for cause, the panel was weeded out, and when the jury was empaneled and sworn.

The old law required that the jurors should be from the county, and it is clear that the expression "in and for" had relation to the taking of jurors residing in the body of the county, and the choosing, selecting and empaneling of the jury on return of venire into court.

The evidence is that the jury was drawn from the Eastern Division jury box, the names therein being persons residing in the counties of the Eastern Division. That the jurors were summoned in the Eastern Division by the marshal. That several of those summoned were weeded out by disqualification or legal excuses at the time the court proceeded to empanel the jury in the Eastern Division, and that the jury which returned the bill was a sworn jury chosen, selected, empaneled and sworn in the Eastern Division.

Again:

It is urged that, before a judge can, in order to secure an impartial trial or save expense, draw a jury from a particular part of the district, that there must be an order, and that in this case the order provided that the jurors be drawn from the jury box of the Eastern Division, "from counties in the Eastern Division other than Chatham and Glynn," and that this meant that they must be drawn from all the counties in the Eastern Division other than Chatham and Glynn, and that as there were at the time, in the jury box, the names of persons from only fourteen counties of the Eastern Division, that the drawing was illegal as a departure from the terms of the order.

Aside from the fact that the courts of different districts differ as to whether any preliminary order is necessary, this reasoning is fallacious.

A large part of the Southern District of Georgia was, at the time inaccessible to the ordinary mode of conveyance. The Okeefenokee swamp covers a large section. When the jury commissisoner and clerk were directed to revise the jury boxes in 1897, they were directed to make

up the list from fourteen counties. (Rec., 84.) Counsel for defense, in his final argument, admitted that the selections then made showed that that order was made to save expense. Now, having the jury box so revised before him on November 22, 1899, the judge makes the order (Rec., 96) that the jury be drawn from *that box* from the counties of the Eastern Division other than Chatham and Glynn, in order to promote an impartial trial and save unnecessary expense, and he proceeds, according to the record, forthwith to draw the jury from the jurors in the counties of the Eastern Division in that box, other than those residing in Chatham and Glynn. (Rec., 88, 89, 90, 62, 70.) Can there be any doubt as to what counties of the Eastern Division were meant by that order of November 22, 1899? Two contemporaneous orders or acts, relative to the same subject-matter, must be construed together.

Again:

Counsel, over the objection of the government (Rec., 100) that he could not collaterally attack the record of proceedings in a court of record by oral testimony, introduced the testimony of Mr. S. F. B. Gillespie, Deputy Clerk at Savannah, to show the following:

That there were in the Eastern Division jury box on November 22, 1899, the date of the drawing of the jury in question, the names of jurors which had been put in there by the clerk and jury commissioner, and which up to that time had never been drawn:

From Chatham County (Rec., 136)	194
From Glynn County (Rec., 137)	12
From the other twelve counties in a box (Rec., 137)	159
Total in box (Rec., 137)	365

It is contended by the defense that the fact that there were not in the box 300 names at the time of the drawing from the *particular parts* of the division from which the court directed the jury to be drawn, makes the drawing totally *void*, because the *act* says that there shall be in the box 300 names at the time of the drawing.

Now, the Supreme Court has expressly held that the Act of 1879 did not repeal these other sections of the Revised Statutes, but must be construed in connection with them.

St. Clair, 154 U. S., 134-147.
Agnew v. *United States*, 165 U. S., 36.

The provisions of Section 802, R. S., were to afford an easy and convenient method of securing an impartial trial free from local prejudice. This is the real reason which justifies the existence and jurisdiction of the United States Courts.

Could it ever have been intended that in drawing a jury from the jury box from particular parts of the district, the court should stop to ascertain if there were three hundred names in the box in the particular locality in the district from which the jury is to be taken?

We think that question is covered in effect by the decision in

Agnew v. *United States*, 165 U. S., 36.

If not, then it certainly is by the reasons and rulings of Judge Billings in the Rondeau case.

In that case:

There were in the box, jurors	303
Of whom there were disqualified	3
And dead	3
Leaving in the box	297

The judge held that a plea in abatement on the ground that there were less than 300 names in the box at the time of the drawing, was not good. Besides the construction he makes on the act, he shows that the cutting down of the number from which the drawing is actually had, operates impartially and does not infringe on the purposes for which the general provision is made.

United States v. *Rondeau,* 16 F. R., 109.

Again:

It is objected that the making up of the jury box in 1897 by the clerk and jury commissioner, two years prior to the drawing, is invalid, because the deputy clerk testified (Rec., 116) that he put in the tickets prepared under the direction of the clerk, and in his presence and under his supervision, and that it was not done by the clerk with his own hands.

If the deputy had done it by himself it would have been sufficient, unless, perhaps, some question of politics were introduced.

As stated in Bacon's Abridgement, a deputy can rarely have less power than his prinicpal.

7 Bacon Abridg., Vol. 7, p. 316 L.

But here it was done under the eye of the clerk.

Again:

The deputy testified that the jury commissioner and clerk each prepared their tickets with the names on them to be put in the box. That all the names were first recorded in a book or jury list. (Rec., 116.) The jury commissioner prepared his own list (Rec., 116), and the

clerk and deputy, the clerk's list. (Rec., 116.) He testified:

> "Mr. Elliott and I put them in alternately; he would put in some and I would put in some others. Q. (By Mr. Rose): You mean he would put in a bundle? A. He would put in a bunch as I folded them, and I would put in a bunch as I folded them. They were made on typewritten paper, with space between, down this side of the sheet and down the other side, and cut in two, then cut crosswise, and then folded once. When folded, the names could not be seen." (Rec., 116.)

I submit that whether the jury commissioner and clerk misinterpreted "alternately" or not, by putting in a "bunch" alternately, instead of a single ticket alternately, that it was a mere irregularity from which no harm could come, with the other precautions taken of preparing equal lists, recording the names and mixing them properly before they were put in the box. And the defense has shown no prejudice from it.

Any irregularity arising from motives which are not of an evil character, and by which the defendants are not shown to have been prejudiced, cannot invalidate an indictment.

U. S. v. *Ambrose*, 3 F. R., 283.
Agnew v. *United States*, 165 U. S., 36.

Again:

It is claimed by the defense, however, that the indictment was invalid, because it was testified by the deputy clerk that it had been the practice in the Southern District of Georgia to put the names of jurors drawn in an envelope at the time of the drawing, and put the envelope back in the box, and that after a year or two, when the

time within which the persons might serve again, as provided by statute, had expired, to commingle those names with the other names in the box which had never been drawn.

Now, the defendants have put in evidence (Rec., 119 to 133) a copy of the panel of every jury drawn from the box from the time of its revision in 1897, to the drawing of the Grand Jury, on November 22, 1899, and there is not a *single* name in the Grand Jury panel drawn November 22, 1899 (Rec., 146) which appears to have been ever drawn before. So that if any such names were put back, it cannot possibly affect this case.

But there was nothing wrong in the practice, it has always been the practice in the Southern District of Georgia, growing out of a construction of the law long antedating the appointment of the present judge, and the deputies produced by the defense testified to it only as a practice, and not as a fact as affecting this case.

The providing of a proper number of names with proper qualifications, and the putting them in the box in the manner provided by the statute, is a means provided to secure a body of jurors free from political bias, or bias in a particular case, from which a jury may be drawn for particular cases. There is nothing in the statute which prevents the use and re-use of the same names again when the year of exemption is out, unless it is the provision that the box shall contain 300 names at the time of the drawing, "which shall have been placed therein by the clerk and jury commissioner." In either view of it, they would be names which were placed in the box at the time of the making up of the box by the clerk and jury commissioner, and such jurors are necessarily as free

from bias in any particular case as the remaining jurors in the box who were selected by the clerk and jury commissioner at the same time.

But if that view is not correct, as no name returned to the box is on this panel of Grand Jurors, and as there were over 365 names in the box exclusive of any names which *might* have been returned thereto, the point made does not touch this case.

So much for the points made on the validity of the finding of the indictment considered on their merits.

I insist that none of this evidence ought to have been received by the commissioners over the objections made by the Government at the time. (Rec., 100.)

The acts of a court of record must be shown *by the record* which imports verity.

3 Blackstone Com., p. 24.
20 A. & E. Ency. Law, p. 502.

There were many inaccuracies in giving details of what was done, in Mr. Gillespie's testimony. I do not mean intentionally. See how Mr. Rose has to tell him that he is contradicting the record and making a mistake. (Rec., 102.) It shows the absurdity of bringing up the minor officers of a court of record as witnesses in a collateral proceeding to show what the judge did when he was on the bench. And to show what the clerk and jury commissioner did, by a subordinate of the clerk, when neither of these principal officers is called. If errors are committed by a judge in a court of record, they must be corrected by a direct proceeding in that court. This rule is fundamental.

The attack on the indictment does not go to the guilt or innocence of the accused, but to a matter of procedure in the court in Georgia. It cannot be made otherwise than by a plea in abatement in that court.

Agnew v. *United States*, 165 U. S., 36.

Again:

The rule as stated by the Supreme Court, is that the defendant must take the *first opportunity* to raise such an objection. That a delay of five days after an indictment, found without sufficient excuse for the delay, is fatal to such a plea.

Agnew v. *U. S.* 165 U. S., 36.

In the case at bar, the indictment was found on December 8, 1899. The defendants were arrested in New York on December 14, 1899, on charges based on that indictment, and the bench warrants issued from the court in Georgia. They were put on notice then of the pendency of the indictment, and are charged, as matter of law, with a knowledge of every intervening term of court from that time until now. From the time of their arrest the Government has been earnestly endeavoring to get them to the point of pleading to the indictment. They have pulled back with all the tenacity they have been able to exert. Nothing has kept them away but their own wills.

Mr. Rose, their attorney, representing them in the preliminary proceeding here to hold them to bail to answer to that indictment, was even served with notice by the marshal, from the district attorney, of the particular time and place when and where the defendants could be heard in these matters at the February Term, 1900. They

wholly failed to appear. (Rec., 155-156-161.) Mr. Rose has endeavored to disclaim any responsibility as attorney in this matter, claiming he does not represent the defendants in Georgia, but his own letter recognizes (Rec., 157) that the proceeding in New York is part of "the same case" as that pending in Georgia.

Even if this be a technical objection on the question of validity of service on a particular person, the law does not require that they shall be served with notice of the terms of the court. The certified copy of the notice to Mr. Rose, his reply that he requested to have put of record with the notice and order thereon, shows, at least, that there was a court held at which they might have appeared and filed their pleas in abatement, and that they did not appear.

To allow them now to attempt to set aside the indictment after waiting until, as they contend, the statute of limitations had run in July, 1900, is to allow them to do just what the rule, in regard to filing such pleas at the first opportunity, was intended to cut them off from doing. That the grand jury was illegally constituted will not be inquired of by *habeas corpus*.

Re Haring, 120 U. S., 782.

(C.)

THE INDICTMENT IS SUFFICIENT IN FORM AND SUBSTANCE. ITS ANALYSIS.

1ST COUNT.—CONSPIRACY.—SEC. 5,440, R. S.

In bare outline an analysis of the 1st count of the indictment shows that it charges, by way of inducement, that the defendants (contractors) and the government engineer officer in charge of the Savannah engineering district, had formed and operated for some years in the district a certain scheme to defraud the United States under contracts for river and harbor improvements, which scheme is fully described and set forth in detail. The devices to be used as set forth and described were of three classes: (a) those relating to the fraudulent letting of the contracts to the defendants without competition and at exorbitant prices; (b) those relating to the execution of the work not in accordance with the specifications and fair dealing, and the acceptance of such work by the engineer, and (c) those relating to the approval and payment by the engineer of accounts to be rendered for such work on such contracts at such exorbitant and fraudulent prices, and the division of the fruits of the fraud between the engineer and the contractors. It is further charged by way of inducement, that on October 8, 1896, the defendants had fraudulently obtained from said engineer office, by means of said scheme, two certain contracts, described, let by said engineer officer in the district. The direct charge is then made that

"The said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A.

Connolly, and Oberlin M. Carter, on said first day of January, 1897, in the said eastern division of the Southern District of Georgia, then and there unlawfully, knowingly and feloniously amongst themselves and with said divers other persons to the grand jurors aforesaid unknown, did band, conspire, confederate and agree to gether as aforesaid, to defraud the United States of said divers large sums of money hereinbefore mentioned, by means of applying said fraudulent scheme in and to the execution and completion of the work under said contracts so made on the 8th day of October, 1896, as aforesaid, and in the obtaining of the money for the fraudulent accounts which should be rendered under said contracts to said Oberlin M. Carter, as such engineer officer as aforesaid, and generally to carry said fraudulent scheme into execution in the obtaining of all contracts of like character which might thereafter be let in said Savannah district by the United States through the said Oberlin M. Carter, as such engineer officer."

Criticisms on the First Count.

In his first opinion, his Honor, Judge Brown, expressed some doubt as to the sufficiency of this count (Rec., 50), though he refrained from expressing definitely an opinion upon it. (Rec., 52.) Let us see if the grounds of his doubts are well founded. He says (Rec., 50):

"As the original fraudulent scheme of conspiracy is alleged to have been in continuous process of execution from January, 1891, to October, 1897, and therefore included the two contracts of October 8, 1896 (the only subjects in the indictment), it is evident that the averment of a new conspiracy on January 1, 1897, to apply the old conspiracy to the execution of the contracts obtained by means of the former one (at the time excluded by the statute of limitations), and already in course of execution, is only a pleader's device to avoid the effect of the

statute of limitations, as against the original fraudulent scheme. *But as each new overt act in furtherance of the common purpose becomes in law a new conspiracy, the time of the conspiracy may be laid within the period of the statute of limitations, if the overt act was within that perid, the prior combination, if established, and the later overt act being evidence from which a jury may infer the new conspiracy.* (*People* v. *Mather*, 9 Wend., 229; *Com.* v. *Bartilon*, 85 Penn. St., 482-489.)"

Now, it is most respectfully submitted that the drafting of the indictment in that form was not merely a pleader's device, but that it was properly and necessarily done to conform the pleadings to the facts. In truth, the facts as pleaded express the actual mental processes by which the conspiracy of January 1, 1897, was formed.

Consider in this connection the actual facts as developed in the evidence before the commissioner when the judge sent the case back to him for further evidence. The learned judge states in his second opinion in considering this evidence (Rec., 59), that the Government had actually demonstrated a division of the profits of the contracts by thirds between Carter and the contractors for several years preceding the contracts of October 8, 1896. (Quoted, *ante*, p. 5.) It was a fact, therefore, that there was a scheme to defraud the Government in operation by the defendants in the district, preceding the letting of the October, 1896, contracts. The fact, too, that the profits were continuously divided in thirds between the engineer and the two principal contractors, shows that these were not isolated acts of fraud, but a well-set scheme in continuous operation.

Now, the additional facts were proved, that after obtaining by means of the scheme the contracts of Octo-

ber 8, 1896, the Atlantic Contracting Company, in whose name they had obtained the contracts, had no money to carry on the work. There was no appropriation by Congress available from which Carter as engineer officer could advance the money from month to month as the work progressed as had formerly been done. So that when the work commenced and got under way about January 1, 1897, it was absolutely necessary that there should be *a new meeting of minds* between the conspirators to arrange for carrying on the work, and mutual contributions of money for that purpose. That there was such a new meeting of minds on or about January 1, 1897, was shown by the fact that commencing from the latter part of December, 1896, and running on to June, 1897, Carter and the two principal contractors, Greene and John F. Gaynor, each from time to time alternately contributed money, aggregating about $50,000 each, toward the conduct of the work, and that when the appropriation by Congress became available in July, 1897, they were each paid back his contribution before the division by thirds between them was made.

This evidence was not brought before the Circuit Court on the petition for *habeas corpus,* it as well as all other evidence on the question of guilt being omitted, but we are entitled to any theory of facts which, if proved, would sustain the pleading.

Now, what was the mental process involved in the new meeting of minds which took place on or about January 1, 1897? Was it not that each would contribute his share in money and labor in the construction of the work under the contracts of October, 1896, which they had obtained by the fraudulent scheme, and that they would

apply that scheme to the execution of the work under those contracts and to the obtaining the money for it? If so, why should not the pleader charge the conspiracy when the new meeting of minds took place, and describe the mental process as it actually occurred or was understood between the parties at the time?

This is the kernel of the decision in *People* v. *Mather*, 9 Wend., 229, expressed in the extract quoted, *supra*, by his Honor, Judge Brown. And if, as there stated:

> "The prior combination, if established and the later overt act are evidence from which a jury may infer the new conspiracy,"

it follows that in such case there must be a new conspiracy in fact. And if it be proper and necessary in such case to prove the prior combination, it will be equally appropriate and necessary to set out in the indictment the prior combination as inducement before charging the new conspiracy at the time of the later concerted overt acts.

There are many cases where the commission of acts constituting one crime have to be set out in the indictment as inducement to charging the commission of another crime.

Bouvier's Law Dictionary, Inducement.

An illustration is found in the case of Goggins, where a true certificate was presented to an officer for payment within the three years' limitation, and it was held that evidence was admissible to show that the person presenting it had obtained it by fraud prior to the time when the statute of limitations began to run.

U. S. v. *Goggins*, 9 Biss., 419.

Again:

His Honor, Judge Brown, in his first opinion, expressed (Rec., 51) a doubt as to whether the means by which the conspiracy was to be carried out was sufficiently set out in the first count of the indictment. He admits that in describing the scheme to defraud, the devices to be used are set out with a wealth of particularity above criticism. But, he says:

> "Of the fifteen or twenty devices which it is alleged that scheme contemplated, three-fourths relate to the terms, specifications, and letting out of the contracts themselves, so that most of the scheme could not possibly be applied to a conspiracy formed January 1, 1897, several months after the contracts were to be let out. Of the remaining means or devices what ones are meant to be charged is left wholly undefined."

As already stated, however, the scheme to defraud was made up of devices fully described, (a), relating to the letting of the contracts, (b) relating to the doing of the work under the contracts, and (c) relating to presentation and approval of accounts, the payment of the money on the same and the division of it among the conspirators.

When, therefore, it is charged that the two contracts of October 8th, 1896, had been obtained by the defendants by means of the fraudulent scheme, can there be any doubt that it was intended by that language to convey the idea that the devices described in the scheme relating to the *letting* of the contracts were used in obtaining them? And when it is charged that after so obtaining said two contracts by means of said fraudulent scheme, the defendants on January 1, 1897, agreed to defraud the United States by applying said fraudu-

lent scheme in and to the execution and completion of the work under said contracts and in obtaining the money on fraudulent accounts which should be rendered under them, can there be a doubt that it was intended by that language to convey the idea that the devices described in the scheme relating to the execution of the work, were the devices agreed to be applied in the execution of the work under these contracts, and that the devices described in the scheme relating to the presentation and approval of accounts and obtaining money on them, were the devices agreed upon to be applied to the presentation of accounts and obtaining money on them under these two contracts?

Again, where the argreement, as indicated by the evidence in this case, was to use some one or more or all of the devises described as occasion might require to accomplish the fraud, what principle of law or of good pleading requires the pleader to specify which ones of the several devices described would be actually used?

If *any* of the devices agreed upon, if put in operation, would affect a criminal fraud under the statute, and the indictment charges the agreement as it was made, the indictment as to these averments must be sufficient. As stated by this court, the object of setting out the means is "that the court may see that they are in fact illegal."

U. S. v. *Cruikshank*, 92 U. S., 542.

It is appropriate to note here that in the twelfth line from the bottom of the first count of the indictment as it appears in the printed transcript, p. 19, there is a clerical error made by copyist or printed. The word herein*before* as it appears in the original indictment and certified copy in evidence is printed "hereinafter." A similar

error appears in the printed transcript, page 14, in the misspelling of the word "hundred" at the beginning of the first count of the indictment. These errors will be considered as corrrected by agreement of counsel or the court will be asked to inspect the original record from the court below.

2D COUNT—OVERT ACT.

(Under Conspiracy Set Out in First Count.)

The second count of the indictment, analyzed, shows that it charges that in "pursuance of said conspiracy," set forth in the first count of the indictment, two of the defendants, Connally and Carter, knowingly prepared, on March 17, 1897, a document with false signatures and false witnesses, giving to the defendant contractors, without competition, an important contract for harbor improvement by dredging, and that Carter approved this contract and recommended its acceptance.

Criticism of this Count.

His Honor, Judge Brown, in his first opinion, criticised (Rec., 51) this count as follows:

"The overt act charged in the second count is irrelevant, since it does not appear to be in any way connected with the conspiracy alleged, nor within any one of the means or devises set forth in the conspiracy court."

Let us see if that is true.

The scheme set out in the first count charges, among others, the following devise (Rec., 15):

"That the said fraudulent scheme contemplated that the said Oberlin M. Carter should as such engineer offi-

cer of the United States so in charge of said Savannah district, so fraudulently exercise the said power of his office and the said discretion so vested in him (which powers and discretions are specified previously in the indictment) that competition in the bidding for such river and harbor contracts to be let for the United States, through him, should be cut off, and that the said Benjamin D. Greene, etc. (the defendants, naming them), in the name of some one of them, or of some other person or corporation for their benefit would be the only real bidders for such contract work in said district, etc., * * * and so that the said works in said district put out to be done for the United States on such contracts would be let at high and exorbitant cost to the United States of America."

It is further charged in the first count that on January 1, 1897, the defendant not only conspired to apply the fraudulent scheme to the execution of the work and getting the money on the contracts of October 8, 1896, previously obtained, but (Rec., 19):

> "Generally to carry said fraudulent scheme into execution in the obtaining of all contracts of like character (river and harbor contracts) which might thereafter be let in said Savannah district by the United States, through the said Oberlin M. Carter as such engineer officer in charge."

If, therefore, in pursuance of the conspiracy described in the first count, Carter knowingly assisted in preparing such a contract with false signatures to it, and approved it and recommended its acceptance without competition as charged in the second count, how can it be seriously contended that the act charged is not within the means or devises set forth in the conspiracy count?

Moreover, the overt acts are no part of the crime, but simply show that the *locus penitentia* is past. And it need not appear on the face of the indictment in what way the overt act charged would tend to effect the object of the conspiracy.

U. S. v. *Donau*, 11 Blatchf., 168.
U. S. v. *Britton*, 108 U. S., 199.

The learned judge had recognized and stated this as the law in the same opinion just two pages preceding the criticism, but seems to have overlooked it in the application. He says (Rec., 49):

"It is held to be sufficient, therefore, if the overt act is so described as to apprise the defendant what act is intended to be given in evidence as tending to show that the unlawful agreement was put in operation."

3D, 4TH AND 5TH COUNTS.—OVERT ACTS.

(Under Conspiracy Set Out in First Count.)

The third count of the indictment, analyzed, shows that it charges that "in pursuance of said conspiracy" set forth in the first count, the defendants on July 1, 1897, caused to be *presented* to Carter as such disbursing officer a *certain claim* against the United States, which claim is set out in the count in the form of an account in words and figures, and it is further charged they knew the claim to be false and fraudulent.

The fourth and fifth counts are framed on the acts performed by Carter of the *issuing of two certain checks* as disbursing officer, described in the respective counts, and which checks, it is charged, he issued for claims

presented by the defendants which he knew to be fraudulent.

Criticisms on the 3rd, 4th and 5th counts.

His Honor Judge Brown in his first opinion (Rec., 51, 52) criticises these counts because he says they do not set out the details which made the claims fraudulent. The criticism might have some point if the counts were relied upon as counts charging the presentation of false accounts as separate crimes on which we were seeking to convict the defendants.

The learned judge seems to have overlooked the fact that the charge is conspiracy, and the 3rd, 4th and 5th counts are merely statements of certain specific "acts" done to effect the object of the conspiracy,—acts which are charged, to show that the *locus penetentia* had been passed.

The allegation in the 3rd count that the defendants in pursuance of the conspiracy *presented* the claim (set out in words and figures as an account), is the allegation of the doing of an act, which put the conspiracy in operation and is sufficient in itself. The further allegation that the defendants knew the account to be fraudulent may be treated as surplusage. And therefore that the pleader did not describe the details which made the account presented fraudulent is immaterial.

So in regard to the 4th and 5th counts, the acts charged were the "issuing" by Carter of the checks described. The further allegation that he knew that the claims on which they were issued were fraudulent was unnecessary. and therefore a failure to describe the details of the fraud in the claims cannot be error. The averment is to be treated as surplusage or mere statement of aggravation.

(Whar. Amer. Crim. Law, Sec. 2335.) That the checks were issued in New York does not affect the jurisdiction of the conspiracy in Georgia.

Dealy v. *United States*, 152 U. S., 539.

"In Pursuance of."

Some criticism was made by counsel for the defense, in the argument before the district judge, of the use by the pleader of the common law expression "in pursuance of" instead of the expression used in the statute to "effect the object of," in charging the overt acts. This objection was abandoned. Either form is sufficient.

U. S. v. *Boyden*, 1 Lowell, 266.
U. S. v. *Nunnemacher*, 7 Biss., 137.
U. S. v. *Dustin*, 2 Bond, 332.

Conspiracy and Overt Acts in Separate Counts.

Some criticism of the form of the indictment was made by counsel for defense before the commissioner because of the fact that the overt acts, while charged to have been done "in pursuance of the conspiracy," were set out in separate counts from that in which the conspiracy was charged, referring back, by suitable allegation, however, to the conspiracy count.

This contention was abandoned before the district judge. It was not sound. One count of an indictment may refer back to allegations of a previous count so as to incorporate its provisions by reference, and that, even where the previous count standing by itself would be totally defective.

Crain v. *United States*, 162 U. S., 625.
Blitz v. *United States*, 153 U. S., 308, 317.

Again, the form is good on another principle. The act of conspiracy to do the things mentioned in the statute is certainly unlawful whether an overt act is committed or not. The punishment, however, only attaches when an overt act is committed. When, therefore, the pleader concludes the description of the conspiracy, in the first count, by the words "contrary to the form of the statute, etc.," it is a mere declaration that the conspiracy itself was unlawful. Either the use or the omission of these words would be a mere matter of form.

Frisbie v *United States,* 158 U. S., 168.

So that if you treat them as surplusage, you take up the next count, and connect it with the conspiracy count in exactly the common law form.

At common law allegations of overt acts were treated merely as statements of aggravation and surplusage.

Wharton Amer. Crim. Law, Sec. 2335.

As under our statute, they must be pleaded, where there are several overt acts deemed necessary to be pleaded, the adoption of any different method from that pursued in this case would require much useless repetition and tend only to render the pleadings cumbersome.

There are several precedents for this method; a notable one was in the case of

U. S. v. *Lancaster et al.,* 44 F. R., 886-931.

6TH COUNT, CONSPIRACY, 5440 R. S.
OVERT ACTS, 7TH AND 8TH COUNTS.

An analysis of the sixth count of the indictment shows that the pleader undertook to charge the new conspiracy, formed on or about January 1, 1897, as indicated by the concerted overt acts committed then, without reciting by way of inducement the antecedent scheme or combination, as had been done in the first count.

No criticism whatever has been made on the sufficiency of this count as a charge of conspiracy, except that it charged a conspiracy in reference to contracts "to be let."

Criticism.

His Honor Judge Brown, criticising this count, in connection with the overt acts charged under it in counts 7 and 8, says (Rec., 52):

> "The conspiracy charged in the sixth count relates wholly to future contracts to be let thereafter, *i. e.*, after January 1, 1897, while the overt acts stated in counts seven and eight relate wholly to the prior contracts of October 8, 1896. On this additional ground, counts 6, 7 and 8 would seem to be necessarily bad."

The learned judge, however, overlooks the principle, previously recognized by him in the same opinion (Rec., 49), and clearly stated by the court in Danau's case, that it is not necessary that it should appear on the face of the indictment in what way the overt act charged would contribute to effect the object of the conspiracy.

U. S. v. *Donau,* 11 Blatchf., 168.
U. S. v. *Britton,* 108 U. S., 199.

And while count 7 does relate to the presentation on July 1, 1897, of an account to Carter under the October 8th, 1896, contracts, and while count 8 does relate to the issue by Carter on July 6, 1897, of a check for $345,000 in payment for work done under contracts of October 8, 1896, it is an unwarranted assumption that the acts involved *related wholly* to the contracts of October 8, 1896. The actual conspiracy formed was broader than the letting of any one contract. The attempt to get the supplemental contract in March, 1897, as described in the second count, shows that as renewed on January 1, 1897, the conspiracy looked to getting future contracts fraudulently without competition. And if Carter had not been removed from his official position in the district in July, 1897, undoubtedly many other future contracts would have been obtained under the conspiracy, if as charged there was such conspiracy on January 1, 1897. To what extent the payment and illegal diversion of this $345,000 in July, 1897, between the conspirators would contribute and was intended to contribute to the carrying on of the renewed conspiracy of January 1, 1897, is a matter of proof, and inference to be determined from the proof when the case is put on trial, and is not to be disposed of because it may not appear in the allegations in the pleadings. As the learned judge himself said (Rec., 49):

> "It is held to be sufficient, therefore, if the overt act is so described as to apprise the defendant what act is intended to be given in evidence as tending to show the unlawful agreement was put in operation."

If we are not right in this contention it shows that the most felicitous way of pleading the new conspiracy of January 1, 1897, evidenced by the concerted acts then committed, was the method adopted in the 1st count, in

which the prior combination and the prior fraudulent obtaining of the contracts of October 8, 1896 (although acts in themselves barred by the statute of limitations), are set out by way of inducement, to charging the renewed conspiracy of January 1, 1897. That we have the right to charge a new conspiracy as of that date, if concerted overt acts were committed then, is clearly ruled in the authorities quoted by his Honor Judge Brown (Rec., 50).

Whenever there is a new meeting of minds in concurrent action to effect an unlawful purpose there must be a new conspiracy.

9TH AND 10TH COUNTS—CONSPIRACY—5438 R. S.

An analysis of the 9th count of the indictment shows that a conspiracy is charged under Section 5438 R. S. between the defendants to defraud the government of the United States by obtaining the allowance and payment by the United States, through Oberlin M. Carter as government engineer in charge of river and harbor improvements in the Savannah district, of a certain claim for labor and material claimed to have been furnished by the Atlantic Contracting Company under the contract of October 8, 1896, which is described, which claim was for the sum of $345,000, "for work, labor and supplies claimed to have been furnished to the United States by said Atlantic Contracting Company for said work at Cumberland sound during the months of December, 1896, January, 1897, February, 1897, March, 1897, April, 1897, May, 1897, and June, 1897." And an overt act—the presentation of one voucher—is charged in the same count. The 10th count is similar to the 9th.

Criticism.

His Honor Judge Brown in his second opinion held these two counts to be good. (Rec., 59.)

But in his first opinion he said as to the 9th and 10th counts (Rec., 52):

> "I should regard these counts as good had the nature of the fraud been sufficiently indicated. Without passing definitely upon these objections to the indictment as a pleading, they are much more important when the indictment is offered as evidence, etc."

As counsel for the defense are still insisting on the insufficiency of these counts, it is as well to say:

That the count is not framed on the crime of having presented a false account or false claim, but upon a *conspiracy* to defraud the United States by obtaining the allowance and payment by an officer of the government of a fraudulent claim for $345,000 for labor and supplies.

The gist of the offense is the corrupt agreement, and the crime would be as complete whether the defendants had agreed definitely upon the different elements of fraud which should go to make up the claim or not.

The reason for the application of a different rule to allegations of conspiracy to defraud by presenting false claims or accounts, is that the general principles controling the form of an indictment for conspiracy must be applicable to all such cases, and ordinarily conspirators agree to consummate frauds on general lines without specifying the details of fraud which shall enter into each particular overt act.

See *U. S.* v. *Dustin*, 2 Bond, 332.

No Merger.

The defendants claim, however, that because the count charges as an overt act the presentation of a voucher in pursuance of the conspiracy, that there was a merger of the conspiracy in the completed act, and therefore we must plead the case as if for the presentation of a false account.

It is well settled there is no merger in such cases.

U. S. v. *Rindshoff,* 6 Biss., 265.
U. S. v. *DeGrief,* 16 Blatch., 20.
U. S. v. *McKee,* 4 Dill., 128.
U. S. v. *Martin,* 4 Cliff., 156.

Ordinarily where the conspiracy and the completed offense are separate crimes, the conviction may be of either crime or both.

U. S. v. *Boyden,* 1 Lowell, 266.

No Misjoinder.

There has been no misjoinder of counts in this indictment.

1024 R. S.
Ingraham v. *United States,* 155 U. S., 434.
Painter v. *United States,* 151 U. S., 396.

If any of the conspiracy counts be good, and a single overt act done in pursuance of the conspiracy be properly charged, it is sufficient, though other counts be bad.

Horner v. *United States,* 143 U. S., 207-213.

(D.)

CERTIFIED COPY OF INDICTMENT WITH EVIDENCE OF IDENTITY SUFFICIENT FOR REMOVAL.

Reviewing certain extradition proceedings had before a committing magistrate under our treaty with Mexico, this court said that under the terms of the treaty *it was intended to confer upon the committing magistrate the same duties and powers usually exercised by them on preliminary examinations in criminal cases in the United States.*

Benson v. *McMahon,* 127 U. S., 457, 461, 463.

In another case arising upon inter-state requisition, the Circuit Court of Appeals (Judges Lacombe and Shipman) held it was not competent to go behind the allegations of the requisition affidavit and finding of the governor thereon on the general merits of the case.

In re White, 55 F. R., 54.

This court held that on requisition from New York for a fugitive arrested in Georgia, a certified copy of an indictment in New York was sufficient and that matters of fact not arising on the face of the indictment were for the trial court.

Roberts v. *Reilly,* 116 U. S., 80, 96.

In his first opinion, however, these decisions were brushed aside by his Honor Judge Brown with the statement (Rec., 49):

> "The extradition cases cited on the argument, whether interstate or international, are wholly inapplicable. Both those proceedings are regulated by wholly different statutes or by treaty stipulations."

But the learned judge overlooked the fact that this court had put its decision in the Benson case (*supra*), upon the ground that the proceedings under that treaty was intended to be assimilated to the usual procedure in the United States.

We think that the correct rule on this point is laid down in Belknap's case, decided in 1899 by Judge Evans in Kentucky. He held that:

> "If the indictment be valid on its face and charged a crime in the district where it was found, it *is conclusive* evidence of probable cause, but if the court on inspection of the indictment sees that crime is not clearly charged to have been committed in the district where the indictment is found, no case for removal is made."
>
> *In re* Belknap, 96 F. R., 614.

This, of course, presupposes that the defendant has been identified as the person indicted. Similar rulings had been made in earlier decisions by other judges, except that the question as to whether the indictment was conclusive evidence or only *prima facie* evidence on the merits was left open as unnecessary to be decided in those cases.

U. S. v. *Haskins*, 3 Sawyer, 262.
Ex parte Alexander, 1 Lowell, 530.
U. S. v. *Sheppard*, 1 Abbott, 431.

It is true that in 1878 Judge Lowell refused a warrant of removal where it appeared the indictment was ambiguous, and it was shown that the defendant had not been in the district where the offense was charged to have been committed in twenty-four years.

Pope's case, 27 Fed. cases, 593.

And in 1885 Judge Parker, in Arkansas, held that on *habeas corpus* proceedings the judge could go behind the indictment, so far as to see whether it be possible that the defendant could have committed the crime in the district where charged.

U. S. v. *Rogers,* 23 F. R., 658.

And in 1892 Judge Butler in Pennsylvania held, that where the defendant was never in the district where he was indicted, the court would allow evidence of that fact to be introduced, but he expressly held:

> "The court will not, of course, hear the relator's defense and try the case."

U. S. v. *Fowkes,* 49 F. R., 50.

But in these three decisions the evidence admitted was all directed to jurisdictional facts, embraced practically in the question of identity or jurisdiction of the court where the indictment was found, over the person of the defendant.

The Dana Case.

A new doctrine, however, was introduced into the removal practice through certain unnecessary dicta in the ruling of his Honor, Judge Brown, in the Dana case (68 F. R., 886).

No one will quarrel with the final result arrived at by the learned judge in that case on the statement of facts there made. The error there, we think, was made in the introduction unnecessarily of the new doctrine which reduced the dignity and effectiveness of an indictment to that of an *ex parte* affidavit in a preliminary hearing for commitment.

In the dispute had between this government and Mexico over the Cutting case, in which case Cutting was indicted in Mexico for publication of a libel in Texas, because of the fact that his paper had been circulated over the border, our state department took the position that, by the general law of the land, recognized by all civilized governments, the place of publication of a newspaper fixed the jurisdiction of the crime. This seems to be the only reasonable doctrine. From the facts stated in the opinion in the Dana case it appears that the place of publication of the libel in that case was New York, and that only the state courts in New York had jurisdiction of it. This was sufficient to dispose of the case *on jurisdictional* grounds.

GREENE-GAYNOR CASE, 100 F. R., 941.

The *dicta* announced in the Dana case, that the indictment is to be treated as a mere affidavit in removal proceedings, was made the basis of the first opinion delivered in this case by his Honor Judge Brown in refusing the removal warrant, after the finding of probable cause by the commissioner based on a certified copy of indictment held by the judge to be sufficient as a pleading, and on evidence of identity. He says (Rec., 49):

> "As explained in the Dana case, those two questions are altogether distinct, and while I have some doubt, but do not need to pass on the question of the sufficiency of the indictment *as a pleading*, I have no doubt that, *viewed as an affidavit*, it is insufficient *in its statement of facts* and circumstances to justify a removal when, as in this case, an examination has been demanded by the accused and its sufficiency challenged."

In other words, the sufficiency of the indictment for the purpose of accomplishing a removal is attacked because it fails to transgress every rule of good pleading.

Mr. Bishop says:

> "Neither is it necessary to state mere matter of evidence which the prosecutor proposes to introduce unless it alters the offense, for if so it would make the indictment as long as the evidence, and upon this principle it has been held that an indictment charging defendants with conspiring by divers false pretenses and undue means and devices to obtain money of A, B and to cheat him and defraud him thereof, is sufficient without setting forth the particular means or pretenses."
>
> 1 Bishop's Crim. Proc., Sec. 276.

The indictment in the case at bar has gone very far beyond this, not only in setting out the means intended to be used, but specifying particular overt acts. But to require that an indictment for *conspiracy* to defraud should show on its face statements of fact showing that the fraud had been accomplished is to lose sight of the nature of the offense intended to be charged.

We think that the error into which the learned judge fell in his first opinion was due to the misconceived idea that Section 1014 R. S. is the only provision of law authorizing the removal of persons charged with crime from one jurisdiction of the United States to another, and that in order to make it cover the case of an indictment, the method of procedure for persons arrested after indictment had to be made to conform to the method of procedure in the state for persons arrested before indictment. He says (Rec., 46):

> "That the mode of proceeding in such cases is precisely the same, whether there is an indictment or no indictment." * * * (Rec., 48.) "The

existence of an indictment in another jurisdiction has no bearing upon the application of this statute to proceedings for commitment."

This conclusion is based (Rec., 47) upon a statement of Justice Curtis in *U. S.* v. *Rundlett* (2 Curtis, 41), a case of arrest before indictment under the provisions of the 33rd section of the Judiciary Act (Sec. 1014 R. S.), where discussing that procedure, the justice says:

> "My opinion is that it was the intention of Congress by these words to assimilate all proceedings for holding accused persons to answer before a court of the United States to proceedings for similar purposes by the laws of the state where the proceeding should take place, * * * the prisoner is not only to be arrested and imprisoned, but bailed agreeable to the usual mode of process in the state."

If it be conceded for the purpose of applying the above *dicta* to this case that the 33rd section of the Judiciary Act (Sec. 1014 R. S.) covered the case of arrest and removal on indictment, let us see what is the practice in New York in such cases. Judge BROWN in his first opinion says (Rec., 47):

> "The New York Revised Statutes (1828) declare, Vol. 2, p. 708: 'After the examination of the prisoner is completed, his witnesses, if he shall have any, shall be sworn and examined, and he may have the assistance of counsel in such examination.'"

But the provisions above quoted are taken bodily from the subdivision of the statutes of that state relating to proceedings on "arrest before indictment."

N. Y. Crim. Code, Sec. 201.

In truth the present New York statutes specifically provide that the defendant may be arrested in any county in the State of New York on bench warrant issued on indict-

ment from another county, and no provision is made for any preliminary examination whatever, but the defendant is required to give bail or to be carried to the court where the indictment is found, for trial.

N. Y. Crim. Code, Secs. 300-303.

The learned judge recognizes that to be the state law in New York as to procedure on indictment (Rec., 48).

The construction placed upon section 914 R. S. as to conforming to state practice and procedure in civil common law cases is, that a selection of the state procedure, applied under similar circumstances in the state courts, is what was intended.

And if that provision of Section 1014 in regard to conforming to state practice is applicable to indictments, it would slowly follow that we had the right to invoke the practice in that state applicable to arrest after indictment, and not that applying to arrest *before* indictment.

Section 1,014, R. S., was not intended to cover every removable case, nor does the procedure there exhaust the remedies at the disposal of the Federal courts.

A failure to appreciate this has led to many incongruous decisions. Judge BROWN himself notices (Rec., 48), that:

> "Section 1014 R. S., moreover, plainly contemplates the examination of witnesses and provides for a return of recognizances for their appearance to testify in the case."

That statute too provides expressly only for cases which can be bailed "for trial" or removed to a district "where the trial is to be had."

Where is the remedy in this statute for bringing a defendant to justice where he breaks his bail at any stage of the proceedings after trial?

In Thompson's case in 1888 Judge Montgomery in the District of Columbia discharged the defendant because he held that Section 1014 R. S. applied solely to cases where no trial had been had.

That statute too does not in terms apply to a convict who breaks jail pending the execution of his sentence and who may be arrested in another district. But as held by the courts there are ample provisions of the statutes outside of Section 1014 for the removal of defendants and enforcement of the penalties of the law in such cases.

In re Christian, 82 F. R., 885.
Corbin v. *Boyes*, 34 F. R., 699.

This brings up for consideration the necessity for the enactment of the 33rd section of the Judiciary Act (Sec. 1014 R. S.) and the function it was intended to perform and brings us to:

AN ANALYSIS AND REVIEW OF THE LAWS APPLICABLE TO THE REMOVAL OF PERSONS CHARGED WITH CRIME IN ONE DISTRICT WHO ARE ARRESTED IN ANOTHER.

Congress has never enacted a general code of criminal procedure and the courts of the United States unless controlled by some express statute proceed according to the course of the common law as recognized and existing in America at the time of the adoption of the Constitution. When Congress enacted a code of criminal laws and created courts which it invested with jurisdiction to enforce those laws, it was intended that they should command all

the machinery of the common law for making effective that jurisdiction.

U. S. v. *Reed*, 12 How., 361.
U. S. v. *Maxwell*, 3 Dill., 278.
U. S. v. *Nye*, 4 Fed. Rep., 890.

COMMON LAW PROCEDURE *before* INDICTMENT.

At common law the method of dealing with a person who, having committed a crime in one county is found in another, depended largely upon the fact as to whether the proceeding instituted against him was before or after indictment.

The proceeding on complaint before indictment where bail is not given is thus stated by Chitty:

> "At common law if A committed a felony in the county of B and then went into the county of C, upon information to a justice of the peace for the county of C he might issue his warrant to apprehend him and take his examination and commit him to gaol in the county of C, from whence he might be removed by *habeas corpus* to the county of B for his trial."
>
> Chitty Crim. Law, * p. 35 and * p. 63, I Hale, 580.

This case is instructive as showing that the writ of *habeas corpus* was in common use for accomplishing the removal of persons charged with crime from one county to another for trial. In such cases the justice could also take bail.

2 Hawk. P. Crown, 183, Sec. 8.

Because of the fact that the warrants of a justice of the peace did not run out of his county the practice sprang

up of taking warrants issued by a justice of the peace of one county to a justice in the county in which the defendant was found, and having the latter endorse it for execution in that county. This practice applied only to justices of the peace and was authorized by statute of 23 Geo., II, c. 26, Sec. 12, and 24 Geo., II, c. 55.

Chitty Crim. Law * p. 45.

COMMON LAW PROCEDURE *after* INDICTMENT FOUND.

There were two well recognized modes of procedure for the arrest of defendants indicted, and securing their appearance at the court for trial.

1st. Mr. Chitty says:

> "At common law the usual mode of bringing a defendant into court upon an indictment found against him when it was not considered necessary to pursue him to outlawry was by a writ of capias."
>
> Chitty Crim. Law, * p. 339.

For the accomplishment of that purpose says Mr. Chitty:

> "The warrant of a judge of the Kings Bench extended over the whole realm."
>
> Chitty Crim. Law, * p. 342 and * p. 45.

2nd. The other method which might be pursued at common law is thus stated by Mr. Chitty:

> "When the assize and sessions are over the clerk of assize and clerk of the peace, respectively, will, on application of the prosecutor, grant a certificate of the indictment having been found, upon which any judge of the Kings Bench or justice of the peace of the proper county will grant a warrant for appre-

hending the defendant, and will oblige him to enter into recognizance to answer, or for want of sureties will commit him."

Chitty Crim. Law, * p. 340.

These two methods of procedure after indictment found were concurrent remedies.

Idem, * p. 341.

There was no question of a want of adequate machinery in the common law courts vested with jurisdiction over offenders to secure and subject the person of the defendant to the judgment of the court.

"As there can be no inquiry respecting offenses, without the presence of the party, whenever the power is intrusted of determining the former there must also be authority to compel the latter."

Chitty Crim Law, * p. 338.

Com. Dig. Process, A. I.

At common law there was never any question of a want of process in arresting and returning persons *convicted* of crime to the proper authority to have their just punishment meted out to them, it required no process. Mr. Chitty says:

"At common law where there has been a judgment of outlawry against an escaped defendant it is the same as a conviction, and *any* person may arrest him in order to bring him to execution."

Chitty Crim Law, * p. 365-6.

4 Bla. Com., 320.

It is very clear from the authorities hereinbefore quoted that the courts of the United States must have at their command to be exercised within the United States all the remedial processes known to common law usage, unless

the same has either expressly or impliedly been taken away by some statute.

Chief Justice Marshall, in several of the decisions rendered by him in the proceedings against Aaron Burr pointed out the fact that the 33rd section of the Judiciary Act (embodied in Sec. 1,014, R. S.) did not cover the entire subject or comprehend all the remedies at command of the courts of the United States in the matter of arrest and bringing defendant to trial or judgment. The point was made before him that no express authority was given the court "as a court" by the 33rd section of the Judiciary Act to commit a person for trial. Addressing himself to this, he said:

> "This power is necessarily exercised by courts in discharge of their functions and it seems not to have been expressly given, because it is implied in the duties which a court must perform, and the judicial act contemplates it in this light. They have cognizance of all crimes against the United States."
>
> *U. S.* v. *Burr*, 25 F. Cases, 14692 b.

In another proceeding against Burr the same learned judge said:

> "The question now before the court is whether bail is *demandable* from a person in actual custody against whom an indictment for a misdemeanor has been found. * * * A court of the United States under Section 4 of the Judiciary Act (Sec. 716 R. S.) has power to devise the process for bringing any person before it who has committed an offense of which it has cognizance. The limitation on this power is that the process shall be agreeable to the principles and usages of law. * * *
>
> Whenever by the laws of the United States an offender is to be arrested the process of arrest employed in the state shall be pursued; *but an arrest is positively enjoined for any offense against the United States.* * * *

> *This section (33rd Sec. Judiciary Act), it is true does not respect the process upon an indictment.* But the law would be inconsistent with itself if it required a magistrate to arrest for any offense against the United States, if it commanded him on every arrest to commit or to bail and yet refused a capias and permitted the same offender to go at large as soon as an indictment was found against him."
>
> *U. S.* v. *Burr,* 25 Fed. Cases, 14,694.

Again he said:

> "Upon general principles of law it would seem to me that in all cases where the judgment is to affect the person, the person ought to be held subject to that judgment. * * * Now reasoning by analogy from civil suits to criminal prosecutions it would seem not unreasonable *where there is such evidence* as an *indictment* found by a grand jury, to use such process as will hold the person of the accused within the power of the court, or furnish security that the person will be brought forward to satisfy the judgment of the court."
>
> *U. S.* v. *Burr,* 25 F. Cases, 14,694.

We thus see that it was the view of this great expounder of the jurisprudence of the United States:

1st. That the statutes required an arrest in all cases of crime committed irrespective of whether the person could be disposed of in the method prescribed by Section 1014 R. S. or not.

2nd. That Section 716 R. S. confers upon the courts of the United States the power to frame the proper process to bring the person arrested to trial or satisfaction of judgment.

3rd. That the common law processes, that is, processes issued "agreeably to the principles and usages of law" are at the command of the United States Courts for that purpose.

4th. That a valid indictment is sufficient evidence in itself to make bail demandable.

5th. That on indictment found, the court had the power not only to frame a process which would bring a defendant to trial, but to frame a process which would bring the defendant forward to satisfy its *judgment or sentence.*

It would seem a work of supererogation to attempt to show otherwise than by the views of this eminent jurist that the provisions of Section 1014 R. S. relative to cases to be tried were not intended to supersede the common law remedies for bringing criminals to punishment in cases in which removals are not expressly provided for by that section.

It is a well settled rule of statutory construction that a new statute creating remedies is not to be construed as repealing by implication former statutes or as taking away old remedies unless the new law so far covers the subject-matter as to leave no case formerly provided for without a remedy under the new law.

Hess v. *Reynolds,* 113 U. S., 73.
Railroad v. *Bates,* 119 U. S., 464.

The real necessity for the passage of the 33rd section of the Judiciary Act was not to supply a remedy, because that was already supplied by the common law, but it was to supply committing magistrates under the Federal system. This made it necessary to confer by express statute the power of committing magistrates under the new system upon the several judges and justices of the peace of the respective states. Commissioners were created by a later act.

It was also provided that:

> "Bail shall be admitted upon all arrests in criminal cases where the offense is not punishable by death; and in such cases it may be taken by any of the persons authorized by the preceding section (1014) to arrest and imprison offenders."
>
> Section 1015 R. S.

Accepting the conclusion reached by Justice Marshall that it was intended by Congress by Section 1015 R. S. (last part of Sec. 33 of Judiciary Act amended by Act of 1793), to confer upon the judicial officers mentioned in the first part of Section 1014 R. S. the general powers of committing magistrates as to all crimes against the United States, we do not have to look to the provisions of the last part of Section 1014 R. S. for process of removal in cases arising on indictment. The process of the common law furnishes a complete remedy as we have already seen, viz.:

We get a certified copy of the indictment from the clerk of the court where the indictment is found. We take this to the magistrate in the district where the defendant is found. He issues his warrant. The defendant is brought before him. He accepts bail for his appearance at the court having cognizance of the offense or commits the defendant to jail as the case may be.

Chitty Crim. Law, * p. 341.

Being so committed, the prisoner, at common law would have been removed by writ of *habeas corpus* as we have seen to the court having cognizance of the offense. While under 716 R. S. the judge of the district where the defendant is committed may forthwith frame and issue a warrant for that purpose.

There is such absolute harmony between this method of removal on certificate of indictment at common law and the method of removal provided in the last part of Section 1014 R. S. that some of the courts have of late overlooked the fact pointed out by Justice Marshall that the 33rd section of the Judiciary Act does not "respect the process upon an indictment," and they have failed to see that we have all along been applying to such cases the process of arrest and removal on certificate of indictment provided by the common law.

It may be said that if this method of removal on indictment is operative as a common law remedy, that the other method of arrest by capias wherever the defendant may be found in the United States and carrying him directly to the court issuing the process ought also to be still effective. (2nd Opinions Atty. General, 564.) Undoubtedly this is still true in proper cases. It must be considered, however, that under our practice such a warrant would be executed in the state where the offender is found by the marshal of that district (788 R. S.). That the defendant would have the constitutional as well as statutory right (Sec. 1015 R. S.) in bailable cases to apply by *habeas corpus* to give bail in bailable cases in the district of his arrest for his appearance where indicted. So that as a practical question it amounts to the same thing.

Policy of the Law.

When the vast amount of oral and documentary evidence, let into the record after the case was returned by the judge to the commissioner for hearing on the evidence is considered, and the further fact is considered that even with the four defendants arrested in the same

district and proceeded against at the same time a year and four months have elapsed since the taking of evidence in this second hearing was commenced, and the further fact that if the five defendants in this case had each fled to a different district and the same requirement was had as to making out the case on the evidence, and the impossibility of having the evidence at two places at once, it will readily be seen that such a construction of the law will annihilate the remedial powers of the courts of the United States in the suppression of crime.

Where the defendants take refuge in other states, the prosecution under such a practice must necessarily fail in most cases. Any theory of our removal statutes which, advanced for the first time within the past six years, would lead to such a result should be viewed with a critic's eye. The greater intercourse between the peoples of the states now than formerly makes the preservation of these remedial processes the more important.

(E.)

REMOVAL WARRANT JUSTIFIED ON THE COMPLAINT AND EVIDENCE IRRESPECTIVE OF THE VALIDITY OF THE INDICTMENT.

THE SECOND HEARING.

It is claimed by the defendant's counsel that his Honor Judge Brown had no jurisdiction to send the case back to the commissioner for a second hearing or more evidence, but was bound to discharge defendants if the case as first sent up by the commissioner was insufficient.

Of course if the case as first sent up by the commissioner was sufficient in itself to authorize the warrant, the final action of Judge Brown in issuing the warrant on the whole record must be sustained.

But if it be conceded for the purpose of the argument that the case as first sent up was not sufficient, yet as was stated by Judge SHIPMAN in a case in New York:

> "If the prisoner is discharged, he may be again arrested, and on sufficient evidence may be committed. * * * In none of these proceedings of the commissioner are his orders in the nature of a final judgment of a court of record."
>
> *In re* Martin, 5 Blatch., 303.

If there was a fatal defect in the proceedings before him as they stood, and yet a suggestion in the record of the commission of a crime, it was entirely competent for the judge with the powers vested in him by Section 1014 to himself enter into further investigation or refer the

case to a commissioner for additional evidence on the complaint.

The fact that no new warrant was issued by the commissioner and re-arrest made is immaterial. In answer to a similar point made in the case of Burr, Chief Justice MARSHALL said:

> "To issue the capias to take into custody a person actually in custody would be an idle ceremony. In such a case the order of court very properly supplies the place of a capias."
>
> *U. S.* v. *Burr,* Fed. Cases, Vol. 25, No. 14,694.

However this may be, the record shows that there *was* a second hearing before the commissioner in this case, upon a sworn complaint, with the defendants present and represented by counsel; that evidence was introduced by the prosecution and by the defense, and that there was a finding of probable cause of guilt made by the commissioner upon this evidence.

This alone was sufficient to justify the warrant of removal.

One of the earliest cases of removal from one district to another under the provisions of the 33d section of the Judiciary Act embodied in Section 1014 R. S. was the removal of Burr and Blennerhasset in 1807 from the District of Virginia on the order of Chief Justice Marshall to the District of Ohio for trial. The removal was on simply a written charge preferred by the United States attorney supported by oral and documentary evidence. They were required to give bail to answer such indictments as might thereafter be found.

> *U. S.* v. *Burr,* Fed. Cases, 14,694 A., 25 F. C., pp. 201, 202, 207.

To like effect is

> *In re Burkhart,* 33 F. R., 25.

Whatever may be said for or against the document offered in evidence as to its effectiveness as an indictment, it was certainly sufficient in form to put the defendants on notice of the nature of the charge, for the purposes of a preliminary examination to hold to bail. So also was the affidavit of the assistant district attorney upon which the warrant of arrest issued. And when such a charge is backed up by the sworn testimony of the witnesses delivered before the commissioner and taken down by a stenographer in the presence of the defendants, and when they were given an adjournment of a month and a half after the government's case was closed to get up testimony to meet the government's case, I submit that even if the original affidavit were technically defective and the indictment be reduced to a simple charge made by the prosecuting officer, that for any crime shown to have been committed, by the sworn testimony, the commissioner may hold to bail or commit for trial to the court having cognizance of the offense.

Mr. Bishop says:

> "In England the judges of the courts which are entrusted with the conservation of the peace, are authorized to issue warrants for the arrest, also to commit people already before them, when the occasion for the commitment judicially appears. And the like power in many of our states is held to belong as of right to our judges."
>
> 1 Bishop Crim. Proc., Sec. 715.

It was on this principle that Justice Marshall held Aaron Burr for trial on an indictment, although he had not been arrested on capias nor had any preliminary examination.

> *U. S.* v. *Burr*, Fed. Case, 14694, 25 Vol., p. 189.

In a contempt case while adverting to the fact that it was usual to commence such proceeding by affidavit and rule the Supreme Court of the United States said:

> "If the appellant was entitled of right to purge himself under oath of the contempt, yet it is sufficient that he was informed of the nature of the charges against him by the testimony of a witness taken down by a sworn stenographer at the preliminary examination and that he was present at the hearing of the contempt, was represented by counsel, testified under oath in his own behalf and had full opportunity to make his defense."
>
> *In re* Savin, 131 U. S., 267-280.

In Georgia the rule is that—

> "A court of inquiry may commit for a different offense than that stated in the warrant if the evidence requires it."
>
> Code Ga., of 1895, Sec. 913.

This is in accordance with the common law as stated by Mr. Bishop, and I believe the rule is general. It was held to be substantially the rule in New York.

U. S. v. *Price,* 84 F. R., 636.

The commissioner having found probable cause of guilt, the district judge could not properly have substituted his judgment for that of the commissioner on the weight of the evidence.

Ornelas v. *Ruiz,* 161 U. S., 511.
Bryant v. *United States,* 167 U. S., 105.

STATUTE OF LIMITATIONS—FUGITIVES FROM JUSTICE.

It is claimed by defendants' counsel, however, that if the present indictment is in any way so defective as to make it fail, that no new indictment can be found, because, as they claim, the statute of limitations has run; and that, therefore, the court will, in this case, go further than in ordinary cases and brush aside the indictment found in December, 1899, for alleged technical defects, in order to hold that the three years' limitation expired in July, 1900, on the last alleged overt act, the payment of money on the contracts in July, 1897.

Defendants' counsel say:

> "In this case the defendants never fled from the justice of the state or United States, they have always been in the United States and subject to the process of the United States."

Now, we submit that the definition of a fugitive from justice in Section 1045 R. S. has relation to the jurisdiction in which the indictment referred to in Section 1045 R. S., is found. The jurisdiction of the crime in the district as defined by the 6th amendment to the Constitution. He may be a fugitive from justice in the sense of 1045 R. S. in fleeing from one district or state to another, although he may never go out of the United States.

> *U. S.* v. *White*, 5 Cranch, C. C., 116 Fed. Case, 16677, Vol. 28.

In the Streep case, Mr. Justice GRAY, for the court, said:

> "And there can be no doubt that in this respect U. S. Rev. Stat., Sec. *1045, must receive* the same *construction* that has been given to Sec. 5278 by this

court, saying: 'To be a fugitive from justice in the sense of the Act of Congress regulating the subject under consideration, it is not *necessary* that the party should have left the state in which the crime is alleged to have been committed after *indictment*, or for the *purpose of avoiding a prosecution* anticipated or begun, *but simply* that having within a *state* committed that which by its laws constitute a crime, when he is sought to be subjected to its criminal process to answer for his offense he has left its jurisdiction and is found within the territory of another."

Streep v. *United States*, 106 U. S., 134.

"Nor is it necessary in order to satisfy the terms of the statute now before us (1045 R. S.) that the fugitive should have the intention of fleeing from justice as administered by any particular court or system of courts having criminal jurisdiction over the territory where the act supposed to have been criminal was committed."

Idem.

"Proof of a specific intent to avoid either could seldom be had; and to make it an essential requisite would often defeat the whole object of the provision."

Idem.

Now, it is a most persuasive fact that following the return of the indictment in the District Court of the United States for the Southern District of Georgia, on December 8, 1899, that every one of these defendants collected in the City of New York, under the shadow of the wing of the attorneys who had been and were then defending their alleged co-conspirator, Captain Carter, who immediately appeared for them and commenced to resist by every legal means a return to the jurisdiction where the crime is charged to have been committed.

The defendants have offered no evidence to show that they were not fugitives from justice.

They cannot by demurrer, much less by bare suggestion without evidence, have the court assume that they are not such fugitives.

U. S. v. *Cook,* 17 Wall., 168.

(F.)

THE HABEAS CORPUS PROCEEDINGS.

Limit of Inquiry.

That the grand jury was illegally constituted will not be inquired of by *habeas corpus.*

In re Harding, 120 U. S., 782.

Alleged irregularities committed by a commissioner who had jurisdiction of the person and subject-matter will not be inquired into on *habeas corpus.*

Stevens v. *Fuller,* 136 U. S., 468.
Ornelas v. *Ruiz,* 161 U. S., 502.

In Horner's case Mr. Justice Blatchford, delivering the opinion of this court, said:

> "The commissioner had jurisdiction of the subject-matter involved and of the person of Horner, and the grand jury would have like jurisdiction. * * * If an inferior court or magistrate of the United States has jurisdiction a superior court of the United States will not interfere by *habeas corpus.*"

Horner v. *United States,* 143 U. S., 570-578.

If a case is in process of adjudication in a court of concurrent jurisdiction, the reasons for non-interference would be still more cogent.

It appearing upon the face of the petition for habeas corpus that the case was in process of adjudication in a court of concurrent jurisdiction, the Circuit Court should have refused to entertain the question and declined to allow appeal and supersedeas.

Has a district or circuit judge or District or Circuit Court a discretion in certain cases to refuse to entertain a petition of habeas corpus and to refuse the allowance of an appeal and supersedeas from a refusal to entertain such application?

STATUTES BEARING ON THE QUESTION.

(a.) "The Supreme Court and the Circuit and District Courts shall have power to issue writs of *habeas corpus.*"

751 R. S.

(b.) "The several justices and judges of the said courts within their respective jurisdictions shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of restraint of liberty."

752 R. S.

(c.) "Application for writ of *habeas corpus* shall be made to the court or justice or judge authorized to issue the same, by complaint in writing, signed by the person for whose relief it is intended, setting forth the facts concerning the detention of the party restrained," etc., etc.

754 R. S.

(d.) "The court or justice or judge to whom such application is made *shall* forthwith award a writ of *habeas corpus, unless it appears from* the petition itself that the *party is not entitled* thereto. The writ shall be directed to the person in whose custody the party is detained."

755 R. S.

APPEALS TO CIRCUIT COURT OF APPEALS.

(e.) "From the final decision of any court, justice or judge inferior to the Circuit Court, upon an application for a writ of *habeas corpus,* or upon such writ when issued, an appeal may be taken to the Circuit Court for the district in which the cause is heard.

(1.) In the case of any person alleged to be restrained of his liberty in violation of the constitution or of any law or treaty of the United States.

(2.) In case of any prisoner who being a subject or citizen of a foreign state and domiciled therein is committed," etc., etc.

763 R. S.

The appellate jurisdiction under the above section now belongs to the Circuit Court of Appeals under Sections 4 to 6 of the Act of March 3, 1891.

U. S. v. *Fowkes,* 53 F. R., 13.

Lau Ow Bew v. *U. S.,* 144 U. S., 47.

APPEALS TO SUPREME COURT.

(f.) "From the final decision of such Circuit Court an appeal may be taken to the Supreme Court in the cases described in the preceding (763) section."

764 R. S.

But unless the construction of the constitution or a treaty or constitutionality of any law of the

United States is involved, the decision of the Circuit Court of Appeals is final, and such decision can only be reviewed in Supreme Court by *certiorari.*

Lau Ow Bow v. *United States,* 144 U. S., 47.

In the excepted cases, construction of constitution, etc., appeal lies direct from the District and Circuit Courts to the Supreme Court under Act of March 3, 1891.

Boske v. *Comingore,* 177 U. S., 459.

And in such cases the Circuit Court of Appeals may decline to take jurisdiction.

Carter v. *Roberts,* 177 U. S., 496.

PEREMPTORY PROVISIONS.

It will be observed that the language of 755 R. S., (d) above, appears to be peremptory:

> "The *court* or *justice* or *judge* to whom such application is made *shall* forthwith award a writ of *habeas corpus,* unless it appears from the petition itself that the party is not entitled thereto."

It will be observed, too, that it applies to the Supreme Court, as well as to the Circuit and District Courts. It follows, therefore, that whatever right any one of these courts may have *to refuse to entertain* the application, at all, must belong to each and all of them. Let us premise, also, that there are three ways in which a court may treat a petition presented to it.

(1.) It may refuse to entertain jurisdiction of the application at all. Such a case may occur where there is a fatal defect or irregularity in the time or manner of its presentation, or facts made known to the court at the threshold showing that it ought not to consider the ques-

tions presented on the merits, as where the question is then in process of adjudication in regular course before a court of inferior or concurrent juisdiction.

(2.) It may entertain the application, but upon consideration of the petition itself may determine that the party is not entitled to the writ, on the merits of the case stated in the petition.

(3.) It may award the writ and upon full hearing may grant or refuse a discharge as the case may be.

On principle and authority, an appeal does not lie in the first case because it would indirectly accomplish an interference which the refusal to take jurisdiction, as directed by law, was intended to avoid.

Illustrations of the doctrine stated in the first class of cases:

Mirzan's Case.

Mirzan was convicted before our minister in Egypt and was serving out his sentence in the penitentiary at Albany, N. Y. A *motion* was made *for leave to file a petition* for habeas corpus directly to the Supreme Court. Chief Justice White said:

> "This motion is denied. As since the Act of March 3, 1885, 23 Stat. L., 437, an appeal lies to this court from judgments of the Circuit Courts in habeas corpus cases, this court will not issue such writ, *even if it has the power*—about which it is unnecessary to express an opinion—in cases where it may as well be done in the proper Circuit Court, if there are no special circumstances in the cases making direct action or intervention by this court necessary or expedient. In this case there are no such special circumstances, and the application may as well be made to the Circuit Court for the Northern District of New York as here. *Our right to exercise*

this discretion is shown by the principles on which the decisions in *ex parte* Royall Nos. 1 and 2, 117 U. S., 241, and *ex parte* Royall, 117 U. S., 254. This practice was suggested by us and followed in *Wales* v. *Whitney*, 114 U. S., 564."

Re Mirzan, 119 U. S., 584.

This action of the Supreme Court is totally inconsistent with the view that 755 R. S. requires imperatively that the court shall take jurisdiction of the application unless it appears on the face of the petition that the petitioner is not entitled on the merits to the writ. It shows that the court may require the defendant to exhaust other remedies before the court will even entertain jurisdiction of the application. And as we have seen, the statute is no more imperative in regard to the Circuit and District Courts than it is in regard to the Supreme Court.

The Lancaster Case.

Lancaster *et al.*, under Secs. 5,508, 5,509, R. S., were indicted in the United States Circuit Court for the Southern District of Georgia for conspiracy to deprive a citizen of the United States of a constitutional right, and for murder committed in pursuance of such conspiracy. They were arrested and held in jail in the custody of the marshal to await trial. A motion was made in the Supreme Court *for leave to file a petition* for writ of habeas corpus. Chief Justice Fuller said:

"The petitioners were indicted under Sections 5,508 and 5,509 of the Revised Statutes, on the 20th day of November, 1890, in the Circuit Court for the Southern District of Georgia, and have been taken into custody. *They have not invoked the action of the Circuit Court* upon the sufficiency of the indict-

ment by a motion to quash or otherwise, but ask leave to file in this court a petition for a writ of habeas corpus upon the ground that the matters and things set forth and charged do not constitute any offense under the laws of the United States or cognizable in the Circuit Court, and that for other reasons the indictment cannot be sustained. *In this posture* of the case we must decline to interfere. The application for leave to file the petition is denied."

Re Lancaster, 137 U. S., 393.

Observe that this was a case in which, under 755 R. S., the Supreme Court was imperatively commanded to issue the writ unless it appeared by the petition itself that the petitioner was not entitled to the writ, and yet the Supreme Court refused to look into the merits of the case solely because the case was in the jurisdiction of the lower court, and the petitioner had not exhausted his remedies there.

Royall's Case.

Royall was indicted in a state court in Virginia, and held under arrest to await trial. He applied to the United States Circuit Court in Virginia for habeas corpus; the writ was granted, but on final hearing was dismissed *for want of jurisdiction*. He appealed to the Supreme Court. That court held that the Circuit Court was in error in holding that it was without jurisdiction, but sustained the dismissal on the following ground, as stated by Justice Harlan:

"The Circuit Court has discretion whether it will discharge him upon habeas corpus, in advance of his trial in the court in which he is indicted; that discretion, however, to be subordinated to any special circumstances requiring immediate action. When the state court shall have finally acted upon the case

the Circuit Court has still a discretion whether under all the circumstances then existing, the accused if convicted shall be put to his writ of error from the highest court of the state or whether it will proceed by habeas corpus summarily to determine whether the peitioner is restrained of his liberty in violation of the constitution of the United States."

Ex parte Royall, 117 U. S., 241.

The reason of this rule is further stated by Justice Harlan, as follows:

"Nor do their circumstances as detailed in the petitions suggest any reason why the state court of original jurisdiction may not without interference upon the part of the courts of the United States, pass upon the question which is raised as to the constitutionality of the statutes under which the appellant is indicted. The Circuit Court was not at liberty, under the circumstances disclosed to presume that the decisions of the state court would be otherwise than is required by the fundamental law of the land, or that it would disregard the settled principles of constitutional law announced by this court upon which is clearly conferred the power to decide ultimately and finally all cases arising under the constitution and laws of the United States." *Idem.*

For similar reasons the petition of Royall, directed to the Supreme Court for writ of habeas corpus, was refused.

Re Royall, 117 U. S., 254.

Let it be observed that the Supreme Court stated that they arrived at the conclusion reached in cases of Mirzan and Lancaster, who were held on federal process, on the principles announced in the case of Royall, who was held on state court process.

Mirzan's case (*supra*).

Horner's Case.

Horner had been committed in the Southern District of New York by the commissioner to await the action of a grand jury in that district. He applied to the Circuit Court for writ of habeas corpus. The case was heard on return of the writ and dismissed, and the case appealed to the Supreme Court. Mr. Justice Blatchford said:

> "The point raised is that the Austrian bond scheme was not a lottery. That is a question properly triable by the court in which an indictment may be found against Horner. He is now held to await action of a grand jury. His case is in the regular course of criminal adjudication. It is not proper for this court on appeal, nor was it proper for the Circuit Court on the writ of habeas corpus, to determine the question as to whether the scheme was a lottery. The commissioner had jurisdiction of the subject-matter involved and of the person of Horner, and the grand jury would have like jurisdiction. * * * If an inferior court or magistrate of the United States has jurisdiction, a superior court of the United States will not interfere by habeas corpus."
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> *Horner* v. *U. S.*, 143 U. S., 570-578.

In *Wood* v. *Brush*, the reason for non-interference is stated by Mr. Justice Harlan thus:

> "The Circuit Court *might well have forborne to act* until this question had been definitely determined, either in the highest court of New York or in this court upon a writ of error sued out by the appellant. While the courts of the United States have power upon habeas corpus to inquire into the cause of the detention of any one claiming to be restrained of his liberty in violation of the constitution or laws, or treaties of the United States, *it was not intended by Congress that they should by writs of habeas corpus obstruct the ordinary administration of the criminal laws* of the states through their own tribunals."
>
> *Wood* v. *Brush*, 140 U. S., 278-390, 370-1.

The state courts are prohibited by Section 751, R. S., from proceeding pending hearing and appeals on habeas corpus before United States courts.

Re Jugiro, 140 U. S., 291.

If the Circuit Court *must entertain* and pass upon the merits of an application for habeas corpus, and if this gives the relator an absolute right of appeal to the Supreme Court on a denial of the application, it necessarily follows that "the ordinary administration of the criminal laws of the United States through their own tribunals can be interfered with" and absolutely "stayed" for an indefinite time by prosecuting successive writs of habeas corpus before the several judges, justices and courts of the United States and taking appeals thereon. Any such result is, however, in the teeth of the statement of the Supreme Court above quoted that "it was not so intended by Congress."

It is submitted that the remedy is suggested by the Supreme Court in the Wood case (*supra*), when it said:

> "The Circuit Court might well have forborne to act until this question had been definitely determined either in the highest court of New York or in this court on a writ of error sued out by the appellant."

It is submitted that the Supreme Court meant just what it said, that the Circuit Court had the right to refuse to take any action, the right to refuse to take jurisdiction of the application.

Cuddy's Case.

Cuddy applied to the District Court of the United States for a writ of habeas corpus setting forth that he was illegally held in custody of the marshal in violation of the laws of the United States, under sentence for alleged contempt of court. His application was denied. He appealed to the Supreme Court. His appeal was not sustained. He then applied to the Circuit Court on the same record, adding some facts known to him before, but omitted in the former petition. Mr. Justice Field held that he could not thus renew his application without obtaining the permission of the Supreme Court. That the second petition should not be heard. Mr. Justice Field said:

> "If he can renew it on another record which may also be in some other particular defective, and so on indefinitely whenever he fails on appeal, it is plain that the writ may often become an instrument of oppression instead of a means of relieving one from an unjust and illegal imprisonment."
>
> *Re Cuddy*, 40 F. R., 52.

It will be observed that Justice Field in Cuddy's case awarded the writ, but after hearing, came to the conclusion that *he should not have entertained the application* at all. It will be observed, too, that the first application had been made to the District Court, and that the second application was made to the Circuit Court, and yet the fact that a similar application had been made to the District Court was decisive on that record.

Simmons Case.

Simmons, in a trial in the Circuit Court for the Eastern District of New York, before Judge Benedict, was on the record sentenced by the latter and placed in custody. He applied for writ of habeas corpus to Judge Wallace in the same court on the same record. The petition was refused by Judge Wallace, who said:

> "That decision, until it is reversed upon a review in this court, ought to be authoritative; otherwise, there might be conflicting adjudications upon the same question in the same court."
>
> *Re* Simmons, 45 F. R., 241.

This case is a very suggestive one.

The act creating the court of appeals took away all appellate jurisdiction from the Circuit Court. As the law now stands, the jurisdiction of the District Court for the Southern District of New York in these matters is as plenary as that of the Circuit Court. His Honor, Judge Brown, having on the record before him issued a warrant directing the marshal to remove certain defendants to Georgia, is it consonant with the comity existing between judges and courts of concurrent jurisdiction in the same district that one should reverse the other? Was it really intended that this should be so? If so, then application after application can be made until all the judges and courts are exhausted, and endless delays obtained by appeals, and then the proceedings be gone over again *ad libitum*.

Has not the decision of the Supreme Court in the Mirzan case (*supra*), and the creation of the Court of Appeals cleared the way for the adjustment of these

questions of conflicting jurisdiction on a rational basis? It would seem so.

Since Greene and the Gaynors are being removed on a warrant issued by the Judge of the District Court of the Southern District of New York, for trial before the District Court in Georgia, it is clear that their cases "were in the regular course of criminal adjudication," as in Horner's case (*supra*); that every question which can be made on habeas corpus can be made in the trial court in Georgia, and carried to the Supreme Court from there, and if the Supreme Court of the United States would not interfere in advance of trial, that no judge or court exercising concurrent jurisdiction with Judge Brown ought to interfere.

Lancaster's case, (*supra*).

Special Circumstances.

It is not contended here but that special circumstances may exist which may sway the discretion of the judge in some cases in favor of the granting of the writ before trial on indictment. But those cases are well defined. In the main they are cases as pointed out by the Supreme Court where some officer of the government is being interfered with in or on account of the performance of his duty.

U. S. v. *Eno,* 155 U. S., 89.
Re Neagle, 135 U. S., 1.
Whitten v. *Tomlinson,* 160 U. S., 242.

The case of *Rose* v. *Roberts* is easily distinguished. In that case Carter was not being removed to another state *for trial,* but was about to be removed to a distant

state for execution of a sentence of imprisonment. Application for *certiorari* was then pending before the Supreme Court, and the Circuit Court of Appeals exercised a discretion in withholding the mandate because "relator would be remediless."

Rose v. *Roberts*, 99 F. R., 952.

DURRANT'S CASE.

It is not overlooked that in Durrant's case, in which the judge was morally satisfied that the merits of the petition for habeas corpus had already been passed on by the Supreme Court and that it was presented for the purpose of obtaining a second appeal for delay only, that Judge De Haven said:

> "The right to present the petition is absolute and the duty of the court to either grant or refuse the writ is one which the court has no lawful right to refuse to discharge."

And that he then cuts the *Gordian knot* by holding that:

> "When it manifestly appears to the court that the application for the writ is entirely destitute of a merit, and that the effect of allowing an appeal from its final judgment in the proceeding will only result in the obstructing of the execution of the laws of the state, then the court may properly refuse to entertain order giving its consent to such appeal."
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> *Re* Durrant, 84 F. R., 318.

The judge in reaching this conclusion takes issue with the conclusion of Judge Lacombe in the Jugiro case (44 F. R., 754). A comparison, however, of the provisions of the statute *relating to appeals* will show that they *are as much and no more peremptory* than are those relating

to *hearing the application* for the writ. It would seem that Judge De Haven, by having improvidently heard the application for the writ on its merits, instead of refusing to entertain it, involved himself in false logic in order to avoid a result clearly not contemplated by the law.

The Jugiro Case.

His Honor, Judge Lacombe, in the Jugiro case, *had entertained a second application for habeas corpus,* and *had denied* the application and *an order of denial had been duly entered.* On presentation of a petition for appeal, he held the right of appeal to be an absolute one under the statute. The court had denied the application by a general order covering the case on its merits before objection to the exercise of jurisdiction was made, and the right of appeal became operative by virtue of the posture of the case. He has applied that ruling to the case at bar, although in this case he refused the petition at the threshold.

Under the decision of Justice Field in Cuddy's case, however, the court in the Jugiro case might well, at the threshold, have *refused to hear* a second application or to entertain jurisdiction of it, unless the applicant obtained permission of the Supreme Court. Besides, it was not a case in regular process of adjudication, but had reached final judgment.

Re Jugiro, 44 F. R., 754.

PUBLIC POLICY.

The defendants do not lose any substantial right by a refusal of the court, by habeas corpus, to interfere before trial. The same august tribunal, the Supreme Court of the United States, will be the final arbiter on all questions, whether they go up from New York or Georgia. The same public policy which encourages freedom of intercourse and interchange of traffic, and close commercial relations between the states, and gives the citizens of one state equal rights in carrying on business and contracts in another state, demands that perpetrators of frauds committed in a state who flee for refuge to other states should be brought to quick trial. In the case at bar four of the government's witnesses have died since the court martial trial. Nearly two years have already been consumed by the defense in fighting removal by technical objections.

The Supreme Court has said that Congress never intended by these acts to interfere with the ordinary proceedings in the courts in advance of final judgment, and I submit that it is the duty of the courts to so construe the law.

November 4, 1901.

MARION ERWIN,
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